

A WANG XIAO & ANOR v. KOK WENG TUCK & ORS

HIGH COURT MALAYA, SHAH ALAM
SURAYA OTHMAN J
[SUIT NO: 22NCVC-410-05-2013]
29 JUNE 2015

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***TORT:** Negligence – Professional negligence – Solicitor and client – Breach of duty – Purchase of property – Solicitor appointed by client to prepare sale and purchase agreement – Solicitor failed to take necessary steps to ensure property free from charge or encumbrances – Property auctioned off by bank – Solicitor did not notify bank of client's intention to buy property – Whether solicitor acted with reasonable care, skill and diligence in performance of duty – Whether solicitor breached duty of care*

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***LEGAL PROFESSION:** Duty to client – Breach of contractual duty towards client – Duty of care – Solicitor appointed by client to prepare sale and purchase agreement for purchase of property – Property auctioned off due to solicitor's failure to take necessary steps to ensure property free from charge or encumbrances – Solicitor-client relationship – Whether solicitor owed client contractual duty – Standard to be exercised by solicitor – Whether solicitor acted with reasonable care, skill and diligence in performance of duty – Whether solicitor breached duty of care – Whether solicitor liable in tort*

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The first and second defendants were advocates and solicitors and partners of Messrs David Kok & Partners ('the firm') while the third defendant was a legal assistant at the firm. The plaintiffs appointed the defendants as their solicitors to prepare a sale and purchase agreement ('SPA') for the purchase of a property ('the property') from TI Logistic Sdn Bhd ('the vendor'). The transaction was handled by the third defendant and as an employee at the firm, the third defendant was an agent or a servant of the first and second defendants and had acted on their instructions and/or consent. The plaintiffs paid a deposit sum of RM120,000 ('the deposit sum') to the vendor. The defendants had lodged a caveat on the property four months after the execution of the SPA but the caveat was rejected by the Land Office. However, the defendants were unaware of this rejection. The plaintiffs later discovered that the property had been auctioned off by the chargee bank, CIMB Bank Bhd ('CIMB') due to the vendor's failure to service its loan. The plaintiffs claimed against the defendants at the High Court for the deposit sum. In pleading negligence against the defendants, the plaintiffs submitted that the defendants had breached their duty of care by (i) failing to take necessary steps to ensure that the property was free from charge or encumbrances; and (ii) not acting with reasonable care, skill and diligence in the performance of their duties. The plaintiffs further submitted that they had suffered losses and damages when the property was sold to a third party pursuant to a public auction by CIMB. The issues that arose for the court's determination were (i) whether the defendants had breached their duty of care as solicitors in the matter of their actions in the said SPA; (ii) whether

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the plaintiff had suffered any losses or damages as a result of the defendants' breach of duty of care; and (iii) whether the plaintiffs were entitled to claim the deposit sum with interest and costs.

Held (allowing claim):

- (1) The defendants owed the plaintiffs a contractual duty since there existed a solicitors-client relationship as the firm had been retained by the plaintiffs for the transaction involving the SPA of the property. The standard to be exercised by the defendants was the standard of the ordinary skilled man exercising and professing to have that special skill. The defendants had not only failed to perform their obligation with due diligence and the required skill and care, they were also liable in tort for their wrongful act of depriving the plaintiffs from the benefit of the SPA transaction. (paras 29, 30 & 58)
- (2) A land search conducted by the firm prior to the signing of the SPA disclosed that (i) the property was charged to CIMB; (ii) there was no restriction in interest or special conditions registered on the title deed of the property; and (iii) the registered owner of the property was the vendor. Despite knowing all the pertinent facts, the third defendant still drafted the SPA by inserting the wrong facts that (i) the property was free from encumbrances and was not registered in the name of the vendor; and (ii) by entering the wrong title deed particulars in the SPA. The actions of the third defendant showed that she had negligently misrepresented to the plaintiff that the property was free from encumbrances (paras 33, 34 & 37)
- (3) The duty of the solicitor is not to injure his or her client by failing to do that which he or she had undertaken to do. The third defendant held herself out to the plaintiffs that she would exercise due diligence, care and skill in the SPA transaction and the plaintiffs had relied on her to do the same. Having known that the property was encumbered, the third defendant failed to rectify the SPA to reflect the true circumstances. To make the matter worse, the un-amended SPA was stamped and forwarded to the plaintiffs. (paras 40 & 47)
- (4) The third defendant had failed to take reasonable precautions against reasonable probabilities. Acting as the purchaser's solicitor, the third defendant should have acted reasonably by informing CIMB of the plaintiffs' intention to buy the property. The third defendant did not inform CIMB of the plaintiffs' interest to buy the property and to try to negotiate to redeem the said property for the plaintiffs. The failure of the third defendant to do so was plain and simple negligence (paras 51 & 54)
- (5) The fact that the property was auctioned off by CIMB due to the failure of the vendor's obligation to service its loan to CIMB was not the main cause for the loss suffered by the plaintiffs. The defendants failed to exercise due diligence, reasonable care and skill even before the

- A property was auctioned off. Applying the ‘but for’ test to the facts of this case, it was clear that the effective cause or what materially contributed to the plaintiffs’ loss was the acts or inactions of the defendants in not ensuring that the property was not subject to a charge. (para 57)
- B (6) The loss caused to the plaintiffs by the negligence of the defendants was the loss of the deposit sum paid to the vendor. The plaintiffs claim for the deposit sum with interest was allowed. (para 58)

Case(s) referred to:

- Chang Siew Lan v. Loh Chooi Teng* [2010] 1 CLJ 657 FC (*refd*)
- C *Dato’ Seri Au Ba Chi & Anor v. Malayan United Finance Bhd & Anor* [1989] 2 CLJ 801; [1989] 1 CLJ (Rep) 460 HC (*refd*)
- Gondola Motor Credit Sdn Bhd v. Almurisi Holdings Sdn Bhd* [1992] 4 CLJ 2212; [1992] 1 CLJ (Rep) 112 SC (*refd*)
- Maelstrom Resources Sdn Bhd & Anor v. Shearn Delamore & Co And Another Case* [2007] 1 CLJ 50 HC (*refd*)
- D *Messrs Yong & Co v. Wee Hood Teck Development Corp Ltd (1)* [1984] 1 CLJ 353; [1984] 1 CLJ (Rep) 251 FC (*refd*)
- Midland Bank Trust Co Ltd v. Hett, Stubbs & Kemp* [1978] 3 All ER 571 (*refd*)
- Neogh Soo Oh & Ors v. G Rethinasamy* [1983] 2 CLJ 218; [1983] CLJ (Rep) 663 HC (*refd*)
- Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 1 CLJ 409 FC (*refd*)
- E *Yap Ham Seow v. Fatimawati Ismail & Ors And Another Appeal* [2013] 9 CLJ 577 CA (*refd*)
- For the plaintiffs - Gurdit Singh (Yong Kum Lum with him); M/s Tay Puay Chuan & Co*
- For the defendants - CK Yeoh (Adeline Yew & Pavitha Shanker with him); M/s Ranjit Singh & Yeoh*
- F *Reported by Najib Tamby*

JUDGMENT

- G **Suraya Othman J:**

Introduction

- H [1] The plaintiff’s cause of action against the defendant is founded in tort and in contract for legal services rendered negligently and or in breach of contract in a sale and purchase transaction of a unit of three storey shop office between the plaintiffs as the purchaser and TI Logistics Sdn Bhd as vendor. The defendants had acted for the plaintiffs as their solicitors in the said sale and purchase transaction. The vendor was unrepresented.
- I [2] As a result of the defendants’ breach of contract and or negligence, the sale and purchase transaction could not proceed as CIMB Bank Berhad (chargee bank) of the vendor had foreclosed on the property due to the vendor’s default in paying the monthly loan instalments.

[3] The plaintiff then claimed the sum of RM120,000 from the defendants being the deposit paid by the plaintiffs to the vendor, damages, interest and cost.

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Background Facts

[4] The plaintiffs (Madam Wang Xiao and Mr. Lee Chun Leong) are Singapore citizens and have their address at Apt. Blk. 19, Marine Terrace #05-156, Singapore 440019.

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[5] At all material time the first and second defendants (Mr. Kok Weng Tuck and Mr. Yap Soon Hock) are advocates and solicitors and practicing in the name and style of Messrs David Kok & Partners addressed at Suite 905, 9th Floor, Block E, Phileo Damansara Commercial Centre 1, No. 9, Jalan 16/11, Off Jalan Damansara, 46350 Petaling Jaya, Selangor Darul Ehsan. The first and second defendants are partners of the said firm.

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[6] At all material times, the third defendant (Ms. Sujatha Fam Siez Chez) is an advocate and solicitor and practiced as a legal assistant at the first and second defendants' firm. The first and the second defendants are the employers of the third defendant. The third defendant is an employee or servant or agent of the first and second defendants and or has acted on the instructions and or consent of the first and second defendants.

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[7] On or around November 2012, the plaintiffs had appointed the defendants' legal firm as their solicitors to prepare a sale and purchase agreement ("SPA") concerning the purchase of a three storey shop office unit held under HS(D) 126578 Lot 118023 Mukim Klang, District Klang, Negeri Selangor Darul Ehsan ("the said property") from the vendor (TI Logistic Sdn Bhd). The defendants had agreed to represent the plaintiffs in the matter of the sale and purchase of the said property.

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[8] The SPA transaction was handled by the third defendant. Pursuant to the SPA being executed, the plaintiffs had paid a deposit sum of RM120,000 to the vendor.

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[9] On 20 March 2013, the plaintiff discovered that the said property had been auctioned off by CIMB Bank Bhd (the chargee bank) due to the failure of the vendor (TI Logistic) to service the loan taken for the property.

[10] The plaintiffs' then claimed against the defendants for the sum of RM120,000 being the deposit paid to the vendor and also pleaded negligence against the defendants.

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Plaintiffs' Case

[11] In para. 10 (a) to (g) of the statement of claim, the plaintiffs alleged the following particulars of negligence against the defendants:

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- i. That the defendants misrepresented to the plaintiffs that the property was free from encumbrances *vide* Recital 2 of the SPA;

- A ii. That the defendants breached their duty of care for failing to enter a private caveat on the property to protect the plaintiffs' interest;
- iii. That the plaintiffs rely on the doctrine of *res ipsa loquitur*;
- iv. That the defendants failed to take reasonable steps to confirm that the property was charged to CIMB Bank Berhad (CIMB);
- B v. That the defendants failed to conduct a proper search on the property;
- vi. In the alternative, that the defendants conducted an unsatisfactory or insufficient search on the property; and
- C vii. That the defendants had advised the plaintiffs that there was no charge or encumbrances on the said property.

[12] The plaintiffs contend that it is an implied term of the said agreement that the defendants would exercise due diligence, reasonable skill and care in the performance of their duties in the matter of the sale and purchase of the said property.

[13] Pursuant to the sale and purchase agreement dated 22 November 2012, the plaintiffs had paid a deposit sum of RM120,000 to the vendor T.I. Logistics Sdn Bhd (TI Logistic).

- E [14] Further, the plaintiffs had applied for and obtained approval from OCBC Bank to finance the balance purchase price of RM1,260,000 that was to be paid to the vendor.

[15] Without prior notice, the plaintiffs' discovered that the said property had been sold to a third party pursuant to a public auction by the chargee bank, CIMB Bank Berhad ("CIMB").

- F [16] The plaintiffs contend that the defendants had breached their duty to act with reasonable care, skill and diligence. The plaintiffs had conducted a search on the title of the said property and revisited the SPA dated 22 November 2012 and found that the defendants had breached their duty of care owed to the plaintiffs.
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[17] The plaintiffs contend that they had suffered loss and damage when the said property was sold to a third party pursuant to a public auction by the chargee bank CIMB.

H **Defendant's Case**

[18] Messrs David Kok & Partners ("DKP") was engaged by the plaintiffs to act on their behalf in the SPA dated 22 November 2012 *vis-à-vis* the purchase of a unit of three storey shop office held under HS(D) 126578 Lot 118023 Mukim Klang, Daerah Klang, Negeri Selangor Darul Ehsan ("the said property") by the plaintiffs from TI Logistics. TI Logistic was unrepresented in the SPA transaction.

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[19] The SPA transaction was handled by the third defendant together with the first defendant. A

[20] A land search conducted on the property on 16 November 2012 showed that the property was charged by TI Logistic to CIMB Bank on 21 January 2009. This fact was made known to the plaintiffs and TI Logistic on 20 November 2011 ie, during the signing of the SPA. At the same time, it was then discovered that the SPA contained a drafting mistake, amongst others, on Recital 2 of the SPA which reads as follows: B

(2) the said property is presently free from encumbrances;

[21] TI Logistic (vendor) and the plaintiffs were aware of the mistake and agreed that rectification be made manually by the third defendant after signing of the SPA. The third defendant rectified the mistake on the original copy of the SPA. Recital 2 thereafter reads as follows: C

(2) the said property is presently charged to CIMB BANK BERHAD.

[22] Recital 15 of the SPA reflects the status of the property wherein the property needed to be redeemed from CIMB. In this respect, at all material times, the plaintiffs were well aware that the property was encumbered by the charge in favour of CIMB. D

[23] On behalf of the plaintiffs, DKP lodged a private caveat on 13 March 2013. At all material time, DKP was not aware that the private caveat lodged by them was not registered by the land office until DKP conducted a land search on 17 June 2013. E

[24] On or about 18 March 2013, the third defendant was informed that the property would be auctioned off as TI Logistic had failed to pay their monthly loan instalments. The third defendant was informed of the same and the plaintiffs were advised that in the event the auction is successful, the plaintiffs have an option to terminate the SPA and demand for the refund of the deposit and liquidated damages from the vendor. In this regard, the plaintiffs did not provide any instructions to the defendants. F G

[25] The property was successfully auctioned off on 20 March 2013. The defendants informed the same to the plaintiffs on or about 27 March 2013 and requested for instructions from the plaintiffs as to whether the plaintiffs wish to terminate the SPA and to demand for the return of the deposit and liquidated damages pursuant to the SPA. In this regard, the defendants alleged that the plaintiffs did not provide any instructions to the defendants. H

[26] It is the defendants' case that:

- i) Even if the private caveat which was presented on 13 March 2013 was registered, it would not have affected CIMB's rights to deal with the property as and when necessary including but not limited to auctioning the property; I

- A ii) At all material times, the defendants had acted diligently and have exercised all reasonable care and skill in discharging their responsibilities as solicitors for the plaintiffs;
- B iii) The plaintiffs' action herein is premature as, *inter alia*, the plaintiffs had not instructed the defendants and/or DKP to terminate the SPA. The plaintiffs had also not instructed the defendants and/or DKP to demand for the return of the deposit and the liquidated damages from TI Logistic;
- C iv) As the SPA is not terminated and remains valid, the plaintiffs are not entitled to recover the deposit and/or demand for liquidated damages from TI Logistic. Hence, the plaintiffs have not suffered any loss as pleaded; and
- D v) Taking the plaintiff's case at its highest, even if the defendants had been negligent, (which is denied), the purported loss (which is denied) was not caused by the defendants.

[27] Issues To Be Tried

- E i) Whether the defendants had breached their duty of care as solicitors in the matter of their actions in the said sale and purchase agreement dated 22 November 2012;
- ii) Whether the plaintiffs had suffered any loss or damages as a result of the defendants' breach of duty of care;
- F iii) Whether the plaintiffs are entitled to claim the sum of RM120,000 being the deposit paid to TI Logistic together with interest and costs against the defendants.

The plaintiffs called two witnesses and the defendants also called two witnesses to testify in the trial. They are:

- G i. Lee Chun Leong – PW1/second plaintiff
- ii. Madam Wang Xiao – PW2/first plaintiff
- iii. Ms Sujatha Fam Siez Chez – DW1/third defendant
- iv Ms Ten Shay Tien – DW2.

- H **[28]** Under the general law, the relationship of a solicitor and client gives rise to a duty by the solicitor to exercise due care and skill in carrying out what he has undertaken to do for his client. In *Dato' Seri Au Ba Chi & Anor v. Malayan United Finance Bhd & Anor* [1989] 2 CLJ 801; [1989] 1 CLJ (Rep) 460; [1989] 3 MLJ 434, the solicitor's duty, both in contract and in tort, was stated as follows at pp. 463-464 (CLJ); pp. 436 and 437 (MLJ):

- I The contractual duty between solicitor and client is as set out by Scott LJ in *Groom v. Crocker* [1938] 2 All ER 394 at p 413:

The relationship is normally started by a retainer, but the retainer will be presumed if the conduct of the two parties shows that the relationship of solicitor and client has in fact been established between them. The retainer, when given, puts into operation the normal terms of the contractual relationship, including in particular the duty of the solicitor to protect the client's interest, and carry out his instructions in the matters to which the retainer relates, by all proper means. It is an incident of that duty that the solicitor shall consult with his client on all questions of doubt which do not fall within the express or implied discretion left him, and shall keep the client informed to such an extent as may be reasonably necessary according to the same criteria. In all these aspects, however, the tie between the two is contractual.

Liability in tort. Under the general law the relationship of solicitor and client gave rise to a duty as a solicitor to exercise that care and skill on which he knew his client would rely, and to a duty not to injure his client by failing to do that which he had undertaken to do and which, at the solicitor's invitation, the client had relied on him to do – see *Midland Bank Trust Co Ltd v. Hett, Stubbs & Kemp* [1978] 3 All ER 571.

[29] In the present case, it was not disputed that the defendants owe the plaintiffs a contractual duty since there exist a solicitors' client relationship as the firm had been retained by the plaintiffs for the transaction involving the sale and purchase of the said property.

Did The Defendants Breach The Duty Of Care

[30] The standard to be exercised by the defendants is the standard of the ordinary skilled man exercising and professing to have that special skill. The liability of a solicitor to his client in the tort of negligence can be found from a line of authorities. In the Federal Court's decision of *Messrs Yong & Co v. Wee Hood Teck Development Corp Ltd (I)* [1984] 1 CLJ 353; [1984] 1 CLJ (Rep) 251; [1984] 2 MLJ 39, Syed Agil Barakbah, FJ, stated as follows:

The liability of a solicitor may be viewed in two aspects. At common law the retainer imposes upon him an obligation to be skillful and careful and for failure to fulfil this obligation he may be made liable in contract for negligence whether he is acting for reward or gratuitously. On the other hand, like any other individual, a solicitor is liable for his wrongful acts and if the circumstances justify the charge, he may be made liable to his client in tort. (See *Halsbury's Laws of England*, Third Edition Volume 36 page 96, paragraph 131). He owes a duty not to injure his client by failing to do that which he had undertaken to do and which his client has relied on him to do.

[31] In the case of *Maelstrom Resources Sdn Bhd & Anor v. Shearn Delamore & Co And Another Case* [2007] 1 CLJ 50, Justice Kang Hwee Gee J, (as His Lordship then was), stated the following:

Breach of the Duty of Care – Generally

[52] As to what constitutes a breach generally, see the well-known *dictum* of Baron Alderson in *Blyth v. Birmingham Waterworks Co.* [1856] 11 Exch 781, 784:

A The omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man not do.

B [32] Applying the facts as adduced by evidence in court, there was a mistake made to Recital 2 of the SPA in which the defendants represented to the plaintiffs that the said property was free from encumbrances when in fact the property was charged to CIMB. In evidence, Mr. Lee Chun Leong (PW1/second plaintiff) testified that neither the mistake to Recital 2 nor the matter of the said property being charged to CIMB was communicated to him. Ms Sujatha Fam Siez Chez (DW1/third defendant) however admitted that she discovered the errors to Recital 2 and 3 and testified that she had explained the errors to PW1 during the signing of the SPA on 20 November 2013. She did not rectify the mistakes then but proceeded to execute the SPA with the mistakes intact. She testified that she eventually made the amendments manually. Her (DW1's) testimony was, corroborated by Ms Ten Shay Tien (DW2).

[33] From the evidence, it showed that a land search was conducted on 16 November 2012 by the defendant's firm. The land search was conducted prior to the signing of the SPA. The land search had disclosed that:

- E i) The property was charged to CIMB;
 ii) There were no restriction in interest or special conditions registered on the title deed of the property; and
 iii) The registered owner of the property was the vendor, TI Logistic.

F [34] Despite knowing all the pertinent facts, DW1 still drafted the SPA by inserting the wrong facts that:

- G i) the property was free from encumbrances (Recital 2 cl. 22);
 ii) That the property was not registered in the name of the vendor (Recital cl. 3);
 iii) By entering the wrong title deed particulars in the SPA.

H [35] DW1's evidence in court was inconsistent with her conduct. DW1's evidence showed that DW1 admitted that there were mistakes made to Recital cl. 2 and cl. 3. DW1 had unilaterally amended the said mistakes on the SPA without the knowledge of the plaintiffs. In fact DW1 had sent out the soft copy to the plaintiffs which did not contain the aforesaid amendments to Recital cl. 2 and cl. 3 (the un-amended copy). Further, on 28 December 2012, DW1 sent a stamped SPA which also contained the un-amended Recital cl. 2 and cl. 3 of the SPA. The evidence of DW1 in cross examination is reproduced below:

I Q: Despite you doing the search on the 16, knowing the content of the search. Yet you chose not to amend the agreement on the 20th, is that so?

A: Yes.

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Q: Now this mistake you say are they not material mistake serious mistake?

A: I admit it's a mistake.

Q: When there is a mistake on the agreement you take the initiative to amend the mistake. Isn't it only proper that you get the parties to the agreement to initial those mistake to validate the amendment made to that mistake?

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A: Not really usually the amendment that was conducted by my firm or any other firm, we usually put our office chop and we the solicitor will initial at the mistake.

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Q: And that agreement appears refer to the email at page 12 to 30, correct? That is the soft copy that was sent, and this soft copy didn't contain any amendment as to recital 2 & 3?

A: Yes.

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Q: Then on 28th of December 2012 at page 50 of bundle CBD1, one month later you send a stamped sale and purchase agreement?

A: Yes.

Q: That stamped sale and purchase agreement that was sent is at CBD1 pages 3 to 16, right.

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A: Yes.

Q: Again recital 2 & 3 remains un-amended?

A: Yes.

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[36] It is clear from the evidence above that DW1 did not discover the mistakes on 20 November 2003 when she met PW1. If she had discovered the mistakes then, she would not have emailed the un-amended SPA to the plaintiffs. She would not also have the un-amended SPA stamped and sent to the plaintiffs a month's later on 28 December 2003. This can be seen from DW1's answer when she was cross-examined about the unsent SPA:

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Q: I want you to show me, where in the bundle actually the letter of service of the amended agreement at page 150. My instruction is that the amended agreement was never sent?

A: I agree it was never sent to him.

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Q: Being an agreement that is amended and you have said that clause 3 and 4 are fundamental clauses. Do you think it is fit and proper to send to the plaintiff the amended agreement?

A: Yes, I agree it should be sent.

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[37] Thus, the actions of DW1 showed that DW1 had negligently misrepresented to the plaintiffs that the property was free from encumbrances.

- A [38] The defendants' defence as to the mistakes made in Recital cl. 2 and cl. 3 of the SPA is that the presence of cl. 15 can cure the mistakes made. The defendants contend that cl. 15 is in relation to redeeming a property from a financier who is holding the property as a security. DW1 at trial stated that cl. 15 is only inserted when a property is encumbered.
- B [39] Can the presence of cl. 15 in the SPA be used as a defence for mistakes made in Recital cl. 2 and cl. 3? I would think not. The fact that cl. 15 is inserted or is found in the SPA cannot be used as a defence to negligent acts of a solicitor and it cannot waive the mistakes made by that solicitor.
- C [40] Having known that the property was encumbered, ie, charged to CIMB by the vendor (TI Logistic), DW1 failed to rectify the SPA to reflect the true circumstances. To make matters worse, the un-amended SPA was stamped and forwarded to the plaintiffs. Although DW1 did explain that it is the practice of her firm to use cl. 15 if a property is encumbered, her actions after 20 December 2003 showed that she is negligent or did not know that the property was encumbered.
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Redemption

- E [41] The fact that the property was charged to CIMB was not communicated to the plaintiffs at all until it was too late to salvage the SPA ie, the defendants failed to secure the redemption statement from CIMB until the property was auctioned off. The defendants were already aware that the plaintiffs had secured a loan facility from OCBC Bank Bhd to finance the SPA (CBD1 at pp. 33-38). Therefore the plaintiffs had already secured funds as at 8 November 2012 to redeem the property.
- F [42] The defendants' explanation as to why they did not ask for the redemption statement were as follows:
- i) It was premature since the plaintiffs had not yet secured a loan facility; and
- G ii) The state consent must first be obtained;
- [43] This explanation to my mind has no merits since:
- i) the plaintiffs had already obtained a loan facility as early as 8 November 2012 from OCBC Bank (CBD1 pp. 33-38) and this fact had already been communicated to the defendants; and
- H ii) The defendants had already informed the plaintiffs pursuant to their e-mail dated 12 November 2012 (CBD1 p. 60) that FIC consent need not be obtained. Only the state consent was necessary.
- I [44] Despite that the defendants failed to take any positive steps to secure the state consent except to write a letter dated 27 December 2012 (a good one month after the date of the SPA) to request for some documents. Further, the defendants made no reference to the documents needed for the state

consent. There was also no evidence to show whether the defendants had prepared or forwarded the state consent to the plaintiffs and or the vendor for their signatures. There was simply no correspondence from the defendants on this point. Even then, the documents were requested for RPGT purposes and not for state consent (CBD1 at p. 110).

[45] In cross-examination of DWI, these evidence were elicited:

Q: At page 33 of CBD1 showed the loan approval letter that was addressed to the plaintiff confirming that he had obtained a loan to finance the purchase of the property dated 8th November 2012. You have been served the copy of the document?

A: Yes.

Q: Now you were aware the property was charged to CIMB Bank?

A: Yes.

Q: When were you aware of this?

A: The land search on 16th November 2012.

[46] The defendants' further contend that regardless of whether DWI explained the mistake to the plaintiffs it would not have mattered as the plaintiffs would still want to purchase the property even if it was encumbered. This can be seen during cross-examination of PW1:

Q: Mr Lee, did you ask Patrick whether the property was encumbered?

A: No.

Q: Mr Lee, you were not interested to know that the property was encumbered?

A: No.

Q: Why were you are not interested to know?

A: Because I have the ability to pay for the property. It doesn't matter whether the property is encumbered or not because at the end of the day I'm paying for it. Why should I want to know it?

[47] I find this argument irrelevant since it still remains the duty of the defendants to ensure that all the details pertaining to the said property must be correctly reflected in the SPA. DWI held herself out to the plaintiffs that she will exercise due diligence, care and skill in the SPA transaction and the plaintiffs had relied on her to do the same. It is trite law that the duty of solicitor is not to injure his or her client by failing to do that which he or she had undertaken to do.

[48] This principle is enunciated in the case of *Midland Bank Trust Co Ltd v. Hett, Stubbs & Kemp* [1978] 3 All ER 571, where it was held that:

The solicitors were however liable to the plaintiffs in tort because under the general law the relationship of solicitor and client give rise to a duty of a solicitor to exercise that care and skill on which he knew that his

- A client would rely, and to a duty not to injure his client by failing to do that which he had undertaken to do and which, at the solicitor's invitation, the client had relied on him to do. Furthermore, there was no rule of law which confined a solicitor's duty to his client under his retainer to a contractual duty alone; nor was there any rule of law which precluded a claim in tort for breach of a duty to use reasonable care and skill if there
- B was a parallel contractual duty of care. (Followed in *Yong & Co v. Wee Hood Teck Development Corporation* [1984] 2 MLJ 39; *Dato' Seri Au Ba Chi v. Malayan United Finance Bhd & Anor*; *Dato' Au Development Sdn Bhd v. Malayan United Finance Bhd & Anor* [1989] 3 MLJ 434; *Lai Foh & Sons Sdn Bhd v. Skrine & Co* [2001] 3 CLJ 185).

C **Private Caveat**

- [49] In para. 10(b) of the statement of claim, the plaintiffs pleaded that the defendants had failed to lodge a private caveat on the property to protect the plaintiffs' interest. The evidence adduced during trial is that the caveat was lodged on the said property on 13 March 2013 which is about four months
- D after the execution of the SPA. There was a rejection of the lodgement of the caveat by the land office *vide* letter dated 14 March 2013 to the defendants' firm (CBD1 p. 123). DW1 admitted that the defendants were unaware that the private caveat was rejected by the land office due to an omission by the defendants to enter the plaintiffs' local address in Malaysia on the caveat
- E form. The property was successfully auctioned off by CIMB on 20 March 2013. The defendants then again lodged another private caveat on the property on 19 June 2013 (three months after the auction). By this date, the property had already been auctioned off and it defeats the purpose of entering the private caveat. This clearly showed sheer negligent conduct on the part
- F of DW1 to ensure that the plaintiffs' interest is protected pending the completion of the SPA.

- [50] The defendants further contend that this court should take judicial notice of the fact that the existence of a private caveat would not have prevented the sale of the said property in a public auction and cannot defeat
- G the indefeasible interest of the registered charge. The defendants referred to the Supreme Court's case in *Gondola Motor Credit Sdn Bhd v. Almurisi Holdings Sdn Bhd* [1992] 4 CLJ 2212; [1992] 1 CLJ (Rep) 112; [1992] 2 MLJ 650 where the court states:

- H Any dealing subsequent to the charge and with notice of the charge, as here, cannot defeat the indefeasible interest of the registered charge.

- [51] In the instant case, the fact that CIMB as the registered chargee have an indefeasible interest on the said property is not denied. However, DW1 failed to take reasonable precautions against reasonable probabilities. DW1, acting as the purchaser's solicitor, should have acted reasonably by informing
- I CIMB of the plaintiffs' intention to buy the said property. It is the defendants' duty to communicate this information to CIMB. The cross-examination of DW1 revealed that the intention of the plaintiffs to buy the said property was never communicated to CIMB.

Q: Did you write any letter to CIMB Bank informing your client interest in the property? A

A: I don't understand.

Q: Did you write any letter to CIMB Bank informing them of your client interest in the property; that your client signed the sale and purchase agreement. Your client, I mean the plaintiff. Did you inform them, did you send a copy of the S&P agreement at the time after it was stamped? B

A: I don't remember.

[52] In the Federal Court's case in *Chang Siew Lan v. Loh Chooi Teng* [2010] 1 CLJ 657; [2009] 6 MLJ 776, it was held that: C

[7] Before we conclude, there is a caveat which we would add for members of the conveyancing Bar. Whilst it may not be negligent for a purchaser's solicitor to act in accordance with the terms of an agreement stipulating the role that he or she is required to play in the transaction, it may well be negligent (depending on the particular circumstances of the case) not to advise a purchaser to insist on inserting a clause in a sale and purchase agreement in circumstances as the present where there is an outstanding charge, requiring a separate payment directly to the chargee in order to effect a redemption of the subject property. D

[53] In the case of *Yap Ham Seow v. Fatimawati Ismail & Ors And Another Appeal* [2013] 9 CLJ 577 the court dealt with the issue of the duty of care owed by a solicitor to his client. Raus Sharif FCJ, (as His Lordship then was), in his judgment referred to the judgment of Gunn Chit Tuan J, (as His Lordship then was), in the case of *Neogh Soo Oh & Ors v. G Rethinasamy* [1983] 2 CLJ 218; [1983] CLJ (Rep) 663 wherein His Lordship said that "a solicitor's duty is to use reasonable care and skill in giving such advice and taking such action as the facts of a particular case demand." E F

[54] In our instant case, the plaintiffs had already secured the loan facility from OCBC Bank to buy the said property. DW1 did not communicate with CIMB and informed CIMB of the plaintiffs' interest to buy the property and to try to negotiate to redeem the said property for the plaintiffs. The failure of DW1 to do so, to my mind, is plain and simple negligence. G

Whether The Plaintiffs Had Suffered Loss As A Result Of The Breach Of Duty Of Care

[55] The plaintiffs must show there is a causal link between the loss they have suffered and the defendants' wrong. In the Federal Court's case in *Wu Siew Ying v. Gunung Tungal Quarry & Construction Sdn Bhd & Anor* [2011] 1 CLJ 409; [2011] 2 MLJ 1, the issue whether the 'but for' test was applicable in a negligence action where there were overlapping factors causing harm to the plaintiff was discussed. It was held: H I

- A ... we are of the view that the ‘but for’ test is not the exclusive test to be applied to determine causation of the injury. It can still be applied but not in circumstance when there are two or more acts or events or factors that could or contribute to the injury to the plaintiff. This instant case is a case in point where evidence is established that there are a multiple of factors that could bring about the injury to the plaintiff. And to decide whether there is causation in these circumstances the approach of Lord Reid in *Bonnington Casting Ltd v. Wardlaw*: whether any of these acts or events or factors has materially contributed to the plaintiff’s injury should be adopted. What is a material contribution must be a question of degree. This is for the court to decide but certainly anything that is trifle is not material. As Lord Reid in the same case expounded: ‘contribution which comes within the exception of *de minimis non curat lex* (the law does not concerns itself with trifles) is not material.
- B
- C

[56] In our present case, it is the plaintiffs’ pleaded case that the loss of the plaintiffs’ deposit sum of RM120,000 was caused by the defendants’ breach of their duty of care or negligent conduct in performing their duty. The defendants on the other hand contend that the cause of the loss is clearly due to the vendor’s (TI Logistic’s) failure to service its bank loan with CIMB that caused the property to be auctioned off by CIMB. This then caused the SPA to fail and thus the loss of the deposit of RM120,000 as claimed by the plaintiffs.

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E [57] To my mind, the fact that the property was auctioned off by CIMB due to the failure of the vendor’s obligation to service its loan to CIMB was not the main cause for the loss suffered by the plaintiffs. The defendants should not put the blame entirely on the vendor for causing the foreclosure to the said property. The plaintiffs suffered the loss and damages when the property was auctioned off due to the inaction and negligence on the part of the defendants. The defendants did not exercise due diligence, reasonable care and skill even before the property was auctioned off. Applying the ‘but for’ test to the facts of this case, it was clear that the effective cause or what materially contributes to the plaintiffs’ loss was the acts or inactions of the defendants in not ensuring that the property was not subject to a charge. Even if the property was subject to a charge, the defendants failed to inform the defendants and to enter a private caveat on the property to safeguard the plaintiffs’ interest. Further, the defendants failed to communicate with CIMB to try to salvage or redeem the said property for the plaintiffs. This would have been easily done since the plaintiffs at that point of time had already secured a loan facility from OCBC Bank to pay for the said property. The plaintiffs therefore had proved causation and loss and on that score, I find that the defendants had materially contributed to the loss suffered by the plaintiffs.

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Conclusion

[58] I am satisfied from the evidence, that the defendants had not only failed to perform their obligations with due diligence and the required skill and care but were also liable in tort for their wrongful act of depriving the plaintiffs from the benefit of the sale and purchase transaction. For the reasons stated above, I find that the plaintiffs had proved, on a balance of probabilities, their claim in negligence against the defendants. I find that the loss caused to the plaintiffs by the negligence of the defendants was the loss of the deposit of RM120,000 paid to the vendor (TI Logistic). The plaintiffs did not lead any evidence to prove the other damages and had not submitted on the issue either. Accordingly, I allow the plaintiffs claim for the sum of RM120,000 with interest at the rate of 5% per annum commencing from 22 November 2003 till full realisation.

Costs

Mr Gurdip Singh informed me that he and Ms Pavitha Shanker had agreed on costs of RM12,000. As such, I ordered cost of RM12,000 to be paid to the plaintiffs.

Plaintiffs' claim allowed with costs.

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